

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No.: 3:20-cv-00032-MMD-CSD

Order

Re: ECF No. 32

DAVID BURNS,

Plaintiff

v.

RUIZ, et al.,

Defendants

Before the court is Plaintiff's motion to submit second amended complaint and proposed second amended complaint. (ECF Nos. 32, 32-1.) Defendant filed a response (ECF No. 33), and Plaintiff filed a reply (ECF No. 34).

I. BACKGROUND

Plaintiff is incarcerated within the Nevada Department of Corrections (NDOC). He filed a pro se civil rights complaint pursuant to 42 U.S.C. § 1983. The court screened the original complaint and found Plaintiff failed to state a colorable claim; however, the court granted him leave to amend. (ECF No. 5.)

Plaintiff filed a first amended complaint (FAC), which the court screened. (ECF Nos. 8, 9.) The court found that Plaintiff stated a colorable Eighth Amendment deliberate indifference to serious medical needs claim against Dr. Wulff.¹ The claim is based on allegations that Plaintiff saw Dr. Wulff in August 2018, who decided Plaintiff's arthritis was not important, causing him to suffer in pain until December 2018, when Dr. Wulff refilled some of his arthritis medication. All other claims and defendants were dismissed (ECF No. 8.)

¹ Mistakenly named by Plaintiff as Dr. Wolff.

1 The Attorney General's Office accepted service for Dr. Wulff, and an answer was filed
2 on September 6, 2021. (ECF Nos. 17, 18.)

3 On January 31, 2022, Plaintiff filed a motion to substitute Dr. Hanf in place of Dr. Wulff
4 and filed a proposed second amended complaint (SAC). (ECF Nos. 24, 24-1.) The proposed SAC
5 alleged Plaintiff filed medical kites in June of 2018, to be seen to get his medications for his
6 severe arthritis pain (Tylenol 3 and capsaicin cream). Plaintiff got his cream in July of 2018. On
7 August 10, 2018, Dr. Hanf examined him, and noticed a mole on his palm and said: "This mole
8 is more important than your arthritis pain, this may be a sign of melanoma and I'm ordering a
9 biopsy." Plaintiff claims Dr. Hanf dismissed his arthritis complaints. Plaintiff avers that in
10 December of 2018, Dr. Hanf finally gave Plaintiff relief for his arthritis pain. (ECF No. 24-1.)
11 These allegations are substantially the same as in the FAC, except Dr. Hanf's name is substituted
12 for Dr. Wulff's.

13 Dr. Wulff did not oppose Plaintiff's motion to amend. As a result, the court granted the
14 motion and found Plaintiff stated a colorable Eighth Amendment claim for deliberate
15 indifference to his serious medical need against Dr. Hanf and ordered the SAC filed. (ECF Nos.
16 25, 26.)

17 The Attorney General's Office accepted service for Dr. Hanf, and an answer was filed.
18 (ECF Nos. 27, 28.) A new scheduling order was issued, giving the parties until May 31, 2022, to
19 amend or join parties. (ECF No. 29.)

20 On April 25, 2022, Plaintiff timely filed this motion to submit a second amended
21 complaint and proposed second amended complaint. He states that Defendant's Rule 26
22 disclosures stated Dr. Wulff was in fact the defendant in question. Therefore, Plaintiff asked the
23 court to bring Dr. Wulff in as a defendant again. (ECF No. 32.)

1 Preliminarily, the proposed amendment is actually a proposed third amended complaint
2 (TAC).

3 The proposed TAC names both Dr. Wulff and Dr. Hanf as defendants. Plaintiff alleges he
4 went to the infirmary on August 10, 2018, for a refill of his arthritis medication. He saw Dr.
5 Wulff, who ordered a biopsy for melanoma for a skin lesion he found on Plaintiff's hand. When
6 Plaintiff complained of arthritic pain, Dr. Wulff said, "this is more important," referring to the
7 mole, and the doctor did not prescribe Plaintiff his needed arthritis medication for pain and
8 inflamed joints. Plaintiff states he saw Dr. Hanf on December 6, 2018, who prescribed his pain
9 medication. Plaintiff avers Dr. Hanf could have re-ordered the medication much earlier, but
10 waited until the December 6, 2018 visit. (ECF No. 32-1.)

11 In response, Dr. Hanf argues Plaintiff does not include points and authorities, and he does
12 not attach a proposed amended complaint. Defendants further contend Plaintiff's basis for adding
13 Dr. Wulff back in is that he was identified as a defendant in the Rule 26 disclosures. However,
14 Dr. Hanf's Rule 26 disclosures merely list Dr. Wulff as person who may have knowledge
15 regarding Plaintiff's claim. (See ECF No. 33-1 at 2.) The Rule 26 disclosures also list Plaintiff's
16 medical records, which Plaintiff is required to request to review through the warden's office.

17 II. DISCUSSION

18 Amendment is governed by Federal Rule of Civil Procedure 15, which provides that the
19 "court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave to
20 amend need not be given when amendment: "(1) prejudices the opposing party; (2) is sought in
21 bad faith; (3) produces an undue delay in litigation; or (4) is futile." *Amerisource Bergen Corp.*
22 *v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (citation omitted).

1 The court will excuse Plaintiff's failure to include points and authorities on this occasion
2 as he is proceeding pro se. Plaintiff did in fact attach a proposed TAC, though the docket notes
3 that it was added later in the day after the motion was filed. (ECF No. 32-1.) The court will now
4 address whether Plaintiff states a claim for relief² and whether amendment would be futile.

5 "The government has an 'obligation to provide medical care for those whom it is
6 punishing by incarceration,' and failure to meet that obligation can constitute an Eighth
7 Amendment violation cognizable under § 1983." *Colwell v. Bannister*, 753 F.3d 1060, 1066 (9th
8 Cir. 2014) (citing *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976)).

9 A prisoner can establish an Eighth Amendment violation arising from deficient medical
10 care if he can prove that prison officials were deliberately indifferent to a serious medical need.
11 *Estelle*, 429 U.S. at 104. A claim for deliberate indifference involves the examination of two
12 elements: "the seriousness of the prisoner's medical need and the nature of the defendant's
13 response to that need." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *rev'd on other*
14 *grounds, WMX Tech, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997); *see also Akhtar v. Mesa*, 698
15 F.3d 1202, 1213 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)).
16 If the medical need is "serious," the plaintiff must show that the defendant acted with deliberate
17 indifference to that need. *Estelle*, 429 U.S. at 104; *Akhtar*, 698 F.3d at 1213 (citation omitted).

18 Deliberate indifference entails something more than medical malpractice or even gross
19 negligence. *Id.* Inadvertence, by itself, is insufficient to establish a cause of action under section
20 1983. *McGuckin*, 974 F.2d at 1060. Instead, deliberate indifference is only present when a prison
21 official "knows of and disregards an excessive risk to inmate health or safety; the official must
22 both be aware of the facts from which the inference could be drawn that a substantial risk of
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² The standard of review is set forth in the court's order at ECF No. 25.

1 serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837
2 (1994); *see also Akhtar*, 698 F.3d at 1213 (citation omitted).

3 Deliberate indifference exists when a prison official "den[ies], delay[s] or intentionally
4 interfere[s] with medical treatment, or it may be shown by the way in which prison officials
5 provide medical care." *Crowley v. Bannister*, 734 F.3d 967, 978 (9th Cir. 2013) (internal
6 quotation marks and citation omitted).

7 Plaintiff states a colorable Eighth Amendment deliberate indifference to serious medical
8 need claim in the proposed TAC against Dr. Wulff for the reasons stated in the order screening
9 the FAC. However, it is not clear whether or nor Dr. Wulff is in fact the correct defendant. If
10 Plaintiff is relying solely on the designation of Dr. Wulff as a person who may have discoverable
11 information in Dr. Hanf's Rule 26 initial disclosures, then it is possible Dr. Wulff is not the
12 correct defendant. It is not clear whether Plaintiff has had a chance to review the medical records
13 that were disclosed by Dr. Hanf. However, if Plaintiff is relying on his medical records for the
14 allegation that Dr. Wulff is the doctor he saw in August of 2018 who failed to prescribe him
15 arthritis medication, then Dr. Wulff may be the proper defendant.

16 Plaintiff does not state a colorable claim for deliberate indifference in the proposed TAC
17 against Dr. Hanf. Plaintiff alleges that Dr. Hanf gave him his medication in December of 2018,
18 but he could have given it to Plaintiff sooner. There are no facts alleged that Dr. Hanf knew
19 sooner than December 2018 that Plaintiff needed the arthritis medication. For example, there is
20 no allegation that he saw Dr. Hanf and requested the medication, or that he sent a medical kite or
21 grievance about needing the medication that Dr. Hanf received and ignored. Dr. Hanf must have
22 *known of* and disregarded a risk to Plaintiff's health. In the absence of facts that Dr. Hanf knew
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1 Plaintiff was in pain without his arthritis medication prior to December 2018, there is no basis
2 for a claim against him. However, Plaintiff may be able to state a claim against Dr. Hanf.

3 **III. CONCLUSION**

4 For these reasons, Plaintiff's motion for leave to amend to file a third amended complaint
5 (ECF No. 32) is **DENIED**; however, the denial is **WITHOUT PREJUDICE** and **WITH**
6 **LEAVE TO AMEND**.

7 Plaintiff has one final opportunity to file an amended complaint that asserts a claim for
8 deliberate indifference to his serious medical need under the Eighth Amendment against the
9 correct defendants and that is supported by sufficient factual allegations. The court suggests that
10 Plaintiff kite to review his medical records to ensure he is naming the correct defendants and
11 including sufficient factual allegations to support his claim that those defendants violated his
12 rights under the Eighth Amendment.

13 Plaintiff has up to and including **June 3, 2022**, to file an amended complaint, which shall
14 be titled the **THIRD AMENDED COMPLAINT**. The court's form complaint does not have a
15 checkbox option for a third amended complaint, so Plaintiff shall clearly write "THIRD
16 AMENDED COMPLAINT" on the form in the space between the checkbox for "second
17 amended complaint" and the checkbox for "jury trial demanded." Alternatively, Plaintiff may
18 notify the court by **June 3, 2022**, that he wishes to proceed only with the Eighth Amendment
19 claim against Dr. Wulff in his proposed third amended complaint, in which case the court will
20 order that the proposed third amended complaint (ECF No. 32-1) is the operative pleading.

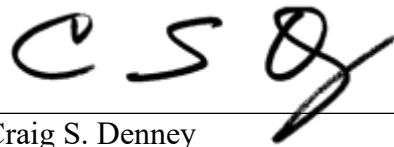
21 If Plaintiff opts to file a new third amended complaint, it must be complete in and of itself
22 without referring or incorporating by reference any previous complaint. Any allegations, parties,
23

1 or requests for relief from a prior complaint that are not carried forwarded in the third amended
2 complaint will no longer be before the court.

3 If Plaintiff fails to file a new third amended complaint by June 3, 2022, this action will
4 proceed only on the Eighth Amendment deliberate indifference claim against Dr. Wulff in the
5 proposed third amended complaint, which will become the operative pleading.

6 **IT IS SO ORDERED.**

7 Dated: May 13, 2022

A handwritten signature in black ink, appearing to read 'CS Denney', is written over a horizontal line.

Craig S. Denney
United States Magistrate Judge